

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION
OPIATE LITIGATION**

THIS DOCUMENT RELATES TO:

All MDL cases

Case No. 1:17-MD-2804

Hon. Dan A. Polster

PHARMACY DEFENDANTS' REPORT ON ZERO MARKET SHARE DISMISSALS

Pursuant to this Court's Order of April 9, 2021, Dkt. 3688 at 2, directing that Pharmacy Defendants¹ "identify for plaintiffs those cases where they have zero-percent market share in the relevant jurisdictions," that Plaintiffs "begin dismissal of those Defendants with prejudice," and that the parties "submit a written report to the Court" on "the status of this effort" by April 30, 2021, counsel for Pharmacy Defendants provide the following report.

On March 11, 2021, this Court ordered the parties to meet and confer and submit a list of five additional representative bellwether cases to proceed to trial. Dkt. 3649. In advance of the parties' submissions, each side exchanged their proposed bellwether cases. Because Pharmacy Defendants are named as defendants in hundreds of cases where they lack any market share according to ARCOS data, they proposed to include one such case as a representative bellwether:

¹ The four "Pharmacy Defendants" are CVS Pharmacy, Inc. and its subsidiaries ("CVS"), Rite Aid of Maryland, Inc., d/b/a Mid-Atlantic Customer Support Center, Rite Aid of Ohio, Inc., and Rite Aid Hdqtrs. Corp. ("Rite Aid"), Walgreens Boots Alliance, Inc., Walgreen Co., and Walgreen Eastern Co. ("Walgreens"), and Walmart Inc. ("Walmart").

Big Stone County, Minnesota v. Teva Pharmaceuticals USA, Inc. et al., Case No. 1:20-op-45102, which asserted both distribution and dispensing claims against Pharmacy Defendants.

Within days, Plaintiffs voluntarily dismissed Pharmacy Defendants from *Big Stone County*. See Case No. 1:20-op-45102, Dkt. 7 (N.D. Ohio Mar. 30, 2021). In its bellwether submission, the PEC assured this Court that, “[w]hen the case was brought to the PEC’s attention, the named pharmacies were dismissed.” Dkt. 3672 at 3. And the PEC explained that its prompt dismissal of Pharmacy Defendants from *Big Stone County* was because “[o]ur [ARCOS] data indicate zero market share for any of the chain pharmacies.” *Id.*

On April 5, 2021, Pharmacy Defendants filed a motion regarding the hundreds of other MDL cases where Pharmacy Defendants are named despite having zero market share. Dkt. 3681. During a status teleconference on April 7, 2021, this Court noted that it had already “issued prior orders to clean up the docket to take care of this” and that “[i]f the defendants have no market share, they shouldn’t be in the case, period.” Dkt. 3685, Trans. 3:19-22, 6:10-11. On April 9, 2021, this Court ordered Pharmacy Defendants to identify such cases for Plaintiffs and ordered Plaintiffs to “begin dismissal of those Defendants with prejudice.” Dkt. 3688 at 2.

Each of the Pharmacy Defendants has fully complied with the Court’s order,² providing the PEC with the case name, docket number, and plaintiffs’ counsel for each identified case:

- On April 5, 2021, Rite Aid identified 507 zero market share cases for Plaintiffs.
- On April 13, 2021, Walgreens identified 434 zero market share cases for Plaintiffs.
- On April 16, 2021, Walmart identified 582 zero market share cases for Plaintiffs.

² Pharmacy Defendants continue to evaluate cases and jurisdictions to identify additional zero market share cases that should be dismissed pursuant to the Court’s order, and reserve the right to bring those cases to Plaintiffs’ attention as they are identified.

- On April 19, 2021, CVS identified 383 zero market share cases for Plaintiffs.³

The day after CVS identified its cases, counsel for Plaintiffs stated that “[w]e are reaching out to all MDL filed cases and the firms that filed them.” Ex. A, Email from J. Rice to S. Herman (April 20, 2021) at 1. One week later, counsel for Plaintiffs stated that “we are taking Judge Polster’s admonition very seriously.” Ex. B, Email from P. Weinberger to D. Cohen (April 27, 2021). But Plaintiffs have *not* complied. As of the date of this filing, Pharmacy Defendants have not heard from the PEC about the dismissal of any zero market share cases—except for the *Big Stone County, Minnesota* case that Pharmacy Defendants proposed as an MDL bellwether, which Plaintiffs still have only dismissed *without* prejudice.

DATED: April 30, 2021

Respectfully submitted,

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³ Pharmacy Defendants also understand that the following additional MDL defendant pharmacies have identified zero market share cases for Plaintiffs:

- On April 15, 2021, Giant Eagle identified 1 zero market share case for Plaintiffs.
- On April 22, 2021, HEB identified 1 zero market share case for Plaintiffs.
- On April 27, 2021, Publix identified 4 zero market share cases for Plaintiffs.
- On April 29, 2021, Kroger identified 274 zero market share cases for Plaintiffs.
- On April 30, 2021, Costco identified 15 zero market share cases for Plaintiffs.

The above-listed defendants continue to evaluate cases and jurisdictions to identify additional zero market share cases that should be dismissed pursuant to the Court’s order, and reserve the right to bring those cases to Plaintiffs’ attention as they are identified.

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